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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 452

222 East Chestnut Street Corporation, a corporation of Delaware,

Petitioner,

vs.

Lakefront Realty Corporation, a corporation of Illinois, et al.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals, For the Seventh Circuit

REPLY BRIEF OF 222 EAST CHESTNUT STREET CORPORATION, PETITIONER,

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REPLY BRIEF OF 222 EAST CHESTNUT STREET CORPORATION, PETITIONER.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner submits this Reply to the Brief and Argument of respondents, and renews its prayer that the petition for certiorari be granted.

Respondents have not answered petitioner's points.

Petitioner (pp 15-47) set up 11 points, some with sub-points, as to why the decision of the Court of Appeals should be reviewed. Respondents have not answered these points individually but have made a general answer which as to many of the points is unresponsive and leaves them admitted *sub silentio*. Petitioner (points **1-4**, pp 15-24) argued that on the existing complaint, the decision of the trial court sustaining a motion to dismiss because of alleged lack of averments as to jurisdiction and *res judicata* was in error; that the appeals court was also in error in affirming the trial court on the basis of the summary judgment practice, inasmuch as that practice was not applicable here because defendants' motion was not a motion for summary judgment and was not disposed of by the district court as such, and it would have been error for the district court to treat the motion as one for summary judgment and consider "extra-pleading" matters of affirmative defense unless (which was not done) petitioner were given notice thereof in the district court, and given opportunity to file counter-affidavit, as provided under Rule 12(b). Respondents nowhere meet these points.

Petitioner's points as to error below in treating defendant's motion to dismiss as a motion for summary judgment are substantial and controlling, and alone are sufficient to warrant this Court in granting review, because it is important that the practice under 12(b) be certain and uniform. But petitioner made other points of substance possibly even more important and controlling which respondents' Brief has largely ignored. Petitioner in the appeals court had made a Motion tendering a proposed Amendment to the Complaint and had asked that court to vacate the district court order of dismissal and grant

leave to file, or that the Amendment be taken with the appeal, or for such other *as would allow the matter to be disposed of on the merits.* The Amendment referred to the zoning board decision set up in the affidavit to respondents' motion and prayed for judicial review and voiding of this decision because (in violation of the provisions of the United States and Illinois constitutions) it deprived petitioner without due process of law of petitioner's statutorily conferred substantive right to prevent zoning violations and was erroneous, illegal and void in the following respects: (a) Hartnett, president of respondent club, was also a member of the agency and actively participated in the hearings before the agency on respondents' application for zoning. (b) Subsequently to the closing of proofs, the agency outside the presence of petitioner, received and considered evidence then presented by respondents as to which petitioner had no opportunity to inspect, consider, cross examine witnesses, or offer evidence in explanation or rebuttal. (c) The agency had no jurisdiction to enter the order reversing the building commissioner's decision because the matter came before the agency on respondents' application for a zoning "violation" and the matter not having come before the agency on appeal from the building commissioner's ruling denying the permit, the agency's jurisdiction was therefore limited to issue of the zoning "violation." (d) Even if the agency had jurisdiction to reverse the building commissioner's ruling in denying the building permit, the decision was erroneous and contrary to law because contrary to a proper construction of the zoning regulations. Respondents make no answer.

Petitioner (point 5, pp 24-27) argued that the appeals court had the power and the right to allow petitioner's motion for leave to file the tendered Amendment to Com-

plaint setting up matters of fact tending to show that the agency decision w s illegal, invalid and null and void because the proceedings before the agency amounted to a denial of due process to petitioner and the agency decision was based on a misconception of law; in support petitioner cited the statute and decisions from this Court. Respondents make no answer.

(e) Petitioner (point 6, pp 27-29) argued that the state administrative review Act, providing that an agency decision can be reviewed only by statutory administrative review, should not be construed as extinguishing the statutory right of petitioner to prevent zoning violations conferred under the later amendment to 73-9. Respondents make no answer.

(f) Petitioner (point 7, pp 29-35) argued that the proceeding before the agency amounted to a denial of procedural due process to petitioner. As sub-point (a) (pp 29-31) petitioner showed that the agency did not have jurisdiction to hold that the proposed structure was a "permitted use" and reverse the building commissioner (who had decided otherwise), because the application, notice and proceeding were on a different issue, namely an application for a variation. Petitioner (sub-point (b), pp 31-33) argued that the agency was a biased tribunal in that Hartnett, president of respondent club, was a member of the agency and participated actively in the hearings. Petitioner (sub-point (c), pp 33-35) argued that it was error for the agency to receive or consider evidence which was not presented at open hearing and as to which petitioner had no opportunity to inspect, consider and cross examine witnesses or offer evidence in explanation or rebuttal. Respondents make no answer to the point or to the sub-points.

(g) Petitioner (point **8**, pp 35-38) argued that the agency decision is based on a clear misconception of the law as to the construction of the applicable zoning regulation and showed that the decision insofar as it determined the front line of the subject parcel would be Lake Shore Drive, several hundred feet away to the east, instead of Chestnut Street on which the parcel abutted on the north and on which the exit and entrance of the proposed garage would open, was in clear violation of the applicable zoning regulation. Respondents make no answer.

(h) Petitioner (point **9**, pp. 38-42) argued that on this record to deprive petitioner of judicial review would be a violation of substantive due process, citing some of the leading cases from this Court, and other texts and authorities. Respondents make no answer.

(i) Petitioner (point **10**, pp 42-45) argued that the appeals opinion holding that petitioner cannot sue here to prevent what the building commissioner has determined to be a zoning violation because there is no violation (since the agency has decided the structure is a permitted use) is begging the question because the agency decision is not "final" but is subject to judicial review. Respondents make no answer.

(j) Petitioner (point **11**, pp 44-46) argued that the appeals opinion in stating that as a result of state court decisions, petitioner has no right of action in a federal court for injunction under 73-9, misconceives the condition of the state law and overlooks (i) the fact that the state supreme court has recognized not only the substantive right as given by 73-9 but the remedy of injunction and has enforced the provision for attorney's fees and (ii) the well established rule that federal courts in apply-

ing equitable relief to substantive rights are not bound by state court decisions as to these remedies, citing *Guaranty Trust Company* v. *York* (1945), 326 U.S. 99. Respondents make no answer.

Reply to Respondents' Argument.

1. The Case Is within the Jurisdiction of this Court.

Respondents state (p 7) "(1) *No federal question is involved.*" This statement is refuted by the record. There are three federal questions involved: (1) A question of federal procedure as to the application of Rule 12(b) prohibiting the consideration of an affirmative defense on defendant's motion to dismiss a complaint. (2) A question of "procedural due process" as to whether an agency decision is legal and valid when: (i) the agency included an officer of respondents, who participated actively in the agency hearings, (ii) the agency decision was on an issue which was not set up in the application, the notice and the scope of the agency hearing, (iii) the agency after the closing of proofs received and considered evidence outside of petitioner's presence, without petitioner having an opportunity to consider, cross examine or rebut. (3) A question of "substantive due process" in that the appeals opinion here has held in substance that the agency decision here is not subject to *any* judicial review.

Petitioner points out again that the effect of the previous state court litigation is that there has been *no judicial review* of this agency decision. It is true that the lower state court judgment purported review and affirm the agency decision; but the state supreme court in holding that petitioner lacked sufficient "standing" to bring state administrative review and in declining to consider the merits or any other issue, held, in substance that the lower court should have declined to hear the

case at all, and consequently the lower court judgment was erroneous so far as it attempted to pass upon the merits and should have confined itself to a dismissal of the suit. It is a well established principle that if a judgment of a lower court, entered on grounds *a* and *b*, is affirmed by the reviewing court on ground *b* alone, that the effect of the judgment as *res judicata* or otherwise is confined to ground *b*. American Law Institute Restatement of the Law of Judgments, p 316, sec 69(b) The affirmance of the state lower court on the ground of lack of standing of petitioner to bring state statutory administrative review is *res judicata* on that issue and that issue alone.

Respondents (pp 7-9) quote at some length from the opinion of the appeals court in the instant case, which opinion has been set out in full as Appendix A to the Petition. Petitioner submits that the issue here is not what the appeals court said, but whether what it said was correct as a matter of law, and that for the reasons given in the petition (and which reasons respondents do not answer) the appeals opinion is in error. Respondents (p 9) repeat the argument that in order for petitioner to recover, it was necessary to show some special damage to petitioner. This point has been dealt with in the petition herein, (pp 41-45) where it has been shown that while the state supreme court has held that "special damage" is a condition precedent to bringing state statutory administrative review, it has not held that special damage is a condition precedent to bringing suit for injunction under 73-9, and 73-9 contains no such requirement; in fact the state supreme court has apparently recognized not only the substantive right as given by 73-9 but the remedy of injunction and has also enforced the provision for attorney's fees, *Pasfield* v. *Donovan* (1956) 7 Ill. 2d 563. Petitioner (pp 44-46) has commented

on the case cited by the appeals court and respondents, *222 East Chestnut Street Corporation* v. *LaSalle National Bank* (1957) 15 Ill. App. 2d 460, 463 and has argued that the case is not persuasive here, for the reason among others, that that case was not heard on the pleadings but on the evidence, and that while after a final hearing on the evidence, the court may have equitable discretion to grant or not grant an injunction, this does not mean that injunction would never be granted or that the complaint be dismissed on a pleading motion. Petitioner has also pointed out (p 45) that this Court has held in *Guaranty Trust Co.* v. *York* (1945) 326 U.S. 99 that where a substantive right is created under state law, the federal courts in enforcing that right will not be bound by state precedents. Respondents make no answer.

Respondents (p 10) cite the action of this Court in denying certiorari on October 13, 1958 in another case, *222 East Chestnut Street Corporation* v. *LaSalle National Bank*, 253 F. 2d 455 (CA 7, 1958). This case did not involve the same issues as the instant case, particularly the absence of procedural due process and substantive due process. Further this Court has stated repeatedly that the denial of certiorari does not constitute any precedent from this Court. *Sunal* v. *Large*, 332 U.S. 174.

Respondents (p 10) argue that petitioner's contention that it has been deprived of "due process" arose for the first time in the proceedings before the court of appeals, after submission but before decision. The conclusive reply to this is that the district court had decided the case on the narrow issue of a motion to dismiss because of *supposed* lack of allegations of jurisdictional amount and *res judicata*, but had not given any consideration to the affirmative defense in bar of the agency decision set out in defendants' affidavit. Petitioner in its brief and argument before the court of appeals had naturally con-

fined itself to these grounds and had shown that neither ground was a basis in law for the district court action. When on oral argument before the court of appeals, it was disclosed to petitioner's counsel that the appeal judges (although inclined to agree with petitioner's counsel that the two grounds given by the district judge were without basis) were nevertheless inclined to affirm on another ground not considered by the district judge, namely the affirmative defense in bar of the agency decision, petitioner's counsel set this up in an affidavit **SA 1**, pp 33-37 and in a subsequent affidavit **SA 2**, pp 2-4, and moved the appeals court for leave to file instanter a tendered Amendment to Complaint, setting up matters of fact which as a matter of law would make null and void the agency decision on which the appeals court in oral argument had placed reliance (and which agency decision later on proved to be the basis of the appeals opinion.) There is therefore no merit in respondents' argument that petitioner should have tendered this proposed Amendment earlier either to the appeals court or to the district court, because up to the time of the oral argument in the appeals court petitioner had *reasonably* relied on the fact that the district court had granted the motion to dismiss on the two grounds of lack of jurisdictional averment and *res judicata*, without consideration of the agency decision, and that these two grounds were the only issues in the appeal. As soon as petitioner on the oral argument before the appeals court had ascertained that the appeals judges were inclined to consider the agency decision as a defense in bar, petitioner, thus taken by surprise, made a timely motion **(SA 1)** *before* the appeals opinion was handed down, moving for leave to amend and tendering its proposed Amendment. Petitioner's position has been and is on this issue that the agency decision as an affirmative de-

fense in bar is precluded by rule 12(b) from consideration on a motion to dismiss; but if, contrary to what seems to be the clear language of the rule, the appeals court is going to hold the agency decision to be open for consideration, then the court should allow the opposing party to raise the issue by proper pleading and make the necessary showing that the agency decision was illegal and null and void for the reason, among others, of violation of procedural due process and violation of substantive due process. Respondents (p 11) repeat their contention that the decision below did not involve any federal question; petitioner has shown that at least three federal questions were involved.

Respondents (p 11) cite *Durley* v. *Mayo*, 351 U.S. 277 (1956), *Stembridge* v. *Georgia*, 343 U.S. 541 (1952). Each of these cases was certiorari to a state supreme court and in each case this Court dismissed on the ground that there was no showing that the judgment of the state court might not have rested on some adequate non-federal ground. Respondents (p 11) also cite *Angel* v. *Bullington*, 330 U.S. 183 (1947). This Court there held that in a suit by plaintiff for a deficiency judgment on a mortgage, a judgment of the highest state court was *res judicata* on a new suit in the federal district court seeking the *same* relief against the *same* defendants on the *same* claim. Obviously the instant case does not come in that category for the reason, among others, that the relief sought in the present suit is essentially different from that sought in the state court suit (statutory administrative review) and the holding of the state supreme court that petitioner lacked "standing" to bring statutory administrative review because absent special damage, is no bar to the instant suit where petitioner's statutorily conferred substantive right does not require as a condition precedent any showing of special damage.

Respondents (p 12) argue that under the provisions of rule 12(b) the court is empowered to consider matters "outside the pleading." Respondents cite no authority for this extraordinary statement. Petitioner (Point 1 pp 15, 16) has shown that under 12(b) (as amended in 1946 and now worded) "extra-pleading" matters are precluded from consideration on a motion to dismiss and that while the district court has the right to treat such "extra-pleading" matters as the basis for a motion for summary judgment, it is requisite that the district court make such an election and give the opposing party an opportunity to file counter affidavits; that this was not done in the instant case and that the district judge disposed of the matter as a motion to dismiss. Respondents make no answer to this argument. The cases respondents cite on p 13 do not deal with the issue. Respondents have made no attempt to analyze these cases and petitioner will not extend this Reply by analyzing them except to state that they are all, on the facts, easily distinguishable from the instant case. For example, *Florasynth Laboratories* v. *Goldberg* (CA 7, 1951), 191 F. 2d 877 and *W. E. Hedger Transportation Corporation* v. *Bushey and Sons* (CA 2, 1951), 186 F. 2d 236, were both cases where the defense of *res judicata* was allowed to be raised by motion because the previous judgment was a judgment of the *same court*, of which that court naturally took judicial notice.

2. Contrary to respondents' contention (p 11), there is a case or controversy between the parties to this action. The whole basis of the appeals opinion is that the agency decision converted conduct that would *otherwise* have been a zoning violation, into a "permitted use," and therefore precluded any action under 73-9; that the

sole remedy of petitioner, or any other objecting property owner, was a suit for state statutory administrative review and that when the state supreme court held that petitioner *absent* special damage, lacked standing to bring such a suit, that that meant that petitioner had no right to judicial review whatever. Petitioner has argued (point 9 pp 38-42) that in a case like the instant one where the agency's decision was not of a *legislative* character (such as granting a variation) but of a *judicial* character (such as holding the structure to be a permitted use), that the due process provision of the United States Constitution requires that somewhere petitioner have a right to judicial review of this *judicial* agency decision, and that lacking any right to state statutory administrative review, petitioner can have recourse to the historic remedy of a suit for injunction. Petitioner has cited several cases from this Court so holding. Respondent makes no answer.

Petitioner also contended (point 7 pp 29-35) that even if it were the law that the agency decision were immune to any judicial review, that this would pre-suppose an agency decision in conformity with procedural due process and that where, as in the instant case, the agency decision violated procedural due process (respondent's president a participating member of the agency, lack of proper application, notice, etc. of hearings on the issue of permitted use, post-hearing secret consideration by agency of evidence without petitioner having a right to meet it) that this would render the decision null and void. Petitioner has cited authorities on this point; respondents make no answer.

II. This Court should review the case because the decision of the court of appeals if allowed to stand, will sanction a clear violation of both procedural due process and substantive due process.

1. The federal questions were raised below by petitioner. Respondents state (p 11) that petitioner is now for the first time arguing the proposition that matters outside of the pleadings may not be considered, that (p. 12) petitioner did not contest before the court of appeals the court's right to consider these matters. Respondents' statements are refuted by the record. With the Motion of petitioner filed with the court of appeals on April 25, 1958 **S.A. 1**, petitioner's counsel filed an affidavit in which it was set up (pp 35-36) that the agency decision was illegal and null and void because of the matters set out in said proposed Amendment, specifying the lack of procedural due process. In **S.A. 2**, the motion of petitioner to amend its motion filed on April 25, 1958, petitioner's counsel filed an affidavit therein reading in part as follows, **S.A. 2**, p 3:

> "Without in any way receding from plaintiff's position (a) that the zoning board decision was not included as a ground of the motion to strike, and (b) being an affirmative defense could not have been so included, affiant on further consideration and reflection (because of the importance of the issues here and the desirability of having the case determined on its merits and not on any technical point of procedure) has deemed it advisable to prepare and present a Motion, so filed on April 25, 1958, in which affiant recites a history of the aforesaid zoning decision, and in which affiant shows that said zoning board decision should properly be no defense to the present suit because first insofar as the decision attempts to rely on a 'permitted use,' it was illegal and invalid, etc."

2. The decision of the court of appeals is in conflict with the decisions of the courts of appeals, in three other circuits, namely District of Columbia, the Sixth and the Fifth.

Respondents (p 14) state that the rules "nowhere expressly prohibit the raising of affirmative defenses by a motion to dismiss." This statement is refuted by the history and present wording of rule 12(b), which provides that except for certain defenses therein stated, every defense "shall be asserted in the responsive pleading thereto, if one is required." It is true that among the defenses that may at the option of the pleader be made by motion, is "(6) failure to state a claim upon which relief can be granted." This obviously means the failure of the complaint *qua* complaint to state such a claim and it is admitted by respondents here (petitioner's point **2a** pp 16-17 that the complaint here does state a good cause of action. It is true that 12(b) provides further that if on a motion asserting defense (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Petitioner points out again that the district court never gave any indication that he was going to treat this motion to dismiss, as a motion for summary judgment and of course never gave petitioner an opportunity to file counter affidavits, that the district court order expressly recited that it was the *motion to dismiss* that was granted. Clearly on this condition of the record, there was no notice to petitioner that the motion was to be so considered, and petitioner was under no duty to file such a counter affidavit.

Respondents (p 15) state "Granting for the sake of argument that some of the defenses raised by motion in the instant case are affirmative defenses, still respondents had the right to elect to present these defenses by motion (Rule 12(b) Federal Rules of Civil Procedure)." No authority is cited for this statement. Respondents (p 15) state, "The fact that the defense of *res judicata* was supported in part by matters outside the record, none of which were controverted does not preclude its consideration." Petitioner points out again that while the district court put its order on the basis of *res judicata*, that this basis was without merit (petition **4(a)** 2d, pp 23-24) and that the Appeals' opinion expressly refrained from putting its decision on *res judicata* but, *put its affirmance* on the ground of the impregnability of the agency decision (saying, p 7a) "It is our duty to affirm if the decision below is correct although the lower court might have relied upon a different ground or reason."

Respondents (p 15) comment on *Sardo* v. *McGrath* (D.C. Cir. 1952), 196 F 2d 20, 23; *Herron* v. *Herron* (CA 5, 1958) 255 F 2d 589 and *Bowdidge* v. *Lehman* (CA 6, 1958) 252 F 2d 366 cited by petitioner. Respondents failed to meet the point raised by petitioner that in each of these cases the court of appeals held that before the district court had the right as a *summary judgment order* to dismiss plaintiff's action, it was necessary that plaintiff be given notice that such an order was under consideration by the court so that plaintiff could have "reasonable opportunity to present all material made pertinent to such a motion by Rule 56", and that in each of the cases, the dismissal by the district court was reversed.

Respondents (p 16) state "Respondents grant that if matters outside the pleadings are considered on a motion

based, as theirs is in part, on plaintiff's failure to state a claim upon which relief could be granted, the motion is to be treated as one for summary judgment. In a word, respondents agree that genuine issues of material fact may not be resolved by affidavits." Petitioner points out again: petitioner's complaint admittedly stated a cause of action; respondents' motion was not a motion for summary judgment but a motion to dismiss and under Rule 12(b) before it could be disposed of as a motion for summary judgment, petitioner should have had an opportunity "to present all material matter pertinent to such a motion by Rule 56." Respondents (p 16) repeat their erroneous statement "there are no facts in dispute" overlooking that if the motion were to be treated as one for summary judgment and the agency decision were to be available for consideration, that petitioner would have the right to present "all material made pertinent to such a motion," namely the material on the different issues set out in the tendered Amendment to Complaint, that because the agency included as participating member respondents' president, because the application, notice etc. before the agency were not pertinent to the agency decision, because the agency after the close of the hearings considered evidence offered by respondents without petitioner having a chance to meet same, *that there was a lack of procedural due process and the agency decision was null and void.*

CONCLUSION.

Respondents (p 17) repeat their statement that there is no federal question involved, ignoring the showing made by petitioner that there are at least three federal questions involved: (1) The proper construction of Rule 12(b), (2) the violation of "procedural due process", and (3) the violation of "substantive due process", and that the appeals' opinion makes no reference to any of these federal questions. Petitioner submits that all three of these questions are important in federal jurisprudence; that in addition, the judgment here, based upon an agency decision in which the respondents' president was an active participating member, where the case was noticed and heard on one issue and decided on an entirely different issue, where the agency after closing of proofs received and considered evidence which petitioner had no chance to meet, where the decision on its face shows such a complete disregard of the applicable zoning application as to be inexplicable on any other basis than the connection of respondents' president with the agency—are so shocking that this Court should exercise its "power of supervision" and grant a review. If the matters of fact set up in the proposed Amendment to complaint are true, there has been a flagrant denial of justice in this case. On the instant motion of defendants to dismiss, Rule 12(b) should be followed and the agency decision, an affirmative defense, excluded from consideration; but if the decision be held available for consideration, then certainly petitioner should be given an opportunity to plead and prove the matters alleged in the tendered Amendment showing that that decision was illegal and

void. If respondents are given leave to aver "extra-pleading" matters, surely petitioner should be given leave to meet these matters.

Administrative agencies have assumed an ever-increasing application and importance in American life. It is vitally necessary that such agencies proceed within the framework required by due process of law. *St. Joseph Stock Yards* v. *U. S.* (1936) 298 U.S. 38, 52, cited petition pp 38-39.

Petitioner renews its request that the petition for certiorari be granted.

Respectfully submitted,

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